Supreme Court, U.S.
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No. 00-1860

IN THE

Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,

Petitioner,

v.

CAROLYN HUMPHREY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, as the Ninth Circuit held below, an employer must offer a "reasonable accommodation" to an employee before terminating her employment even when the employee knows about and previously has rejected that reasonable accommodation, or, as other courts of appeals have held, an employer need not offer a reasonable accommodation to an employee when the employee knows about the "reasonable accommodation" and already has rejected it.

2. Whether, as the Ninth Circuit held below, an indefinite leave of absence that might "plausibly" allow an employee to return to work qualifies as a "reasonable accommodation," or as other courts of appeals have held, a leave of absence must be definite in duration and "likely" to enable the employee to return to work to qualify as a "reasonable accommodation."

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STATEMENT OF THE CASE

Memorial Hospitals Association's ("MHA") Petition For Writ Of Certiorari should be denied for one simple reason: neither the record nor the decision below *raise* the two questions presented by the Petition.

In its first question presented, MHA claims that the Ninth Circuit held that ". . . an employer must offer an employee an accommodation that is known to the employee and that she previously has rejected". *See* Pet. at 2. The Ninth Circuit neither announced such a generic holding nor ever ruled on such an issue — on the contrary, the case below was about the breakdown of the ADA-mandated interactive process and assigning responsibility therefor. In considering that issue, the Ninth Circuit[1] simply held that, under the facts of the case, MHA had violated its "continuing duty" to engage in the interactive process in an effort to find an effective accommodation, *i.e.*, an accommodation that works. *See Humphrey v. Memorial Hospitals Ass.* ("*Humphrey*"), Pet., App. A at 18a ["We conclude, as a matter of law, that . . . MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey"].

The second question presented by MHA is "whether an indefinite leave of absence that might 'plausibly' allow an employee to return to work qualifies as a reasonable accommodation". *See* Pet. at 3. However, the Ninth Circuit

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1. The Ninth Circuit decision below was an *unanimous* opinion, authored by Judge Stephen Reinhardt and joined by Judge Thomas G. Nelson and Phyllis A. Kravitch (Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation).

never considered the issue of the *length* of a leave of absence. Although MHA repeatedly refers to the Ninth Circuit's purported approval of an indefinite leave of absence, MHA never cites the exact portion of the appellate opinion which contains this holding. The reason MHA does not is because it cannot. The decision below is not about a *request* for an indefinite leave of absence, but about MHA's failure to engage in the interactive process toward the end of implementing a reasonable and effective accommodation. *See Humphrey*, Pet., App. A at 21a:

> Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process.

In other words, the Ninth Circuit never had to reach the issue of the *length* of the leave of absence because MHA terminated Humphrey's employment before ever exploring that possibility with her.

Given that MHA has raised two hypothetical questions, devoid of any factual or legal connection to the decision below, its attempt to cast the Ninth Circuit decision as in conflict with other Circuits falls of its own weight. In holding that MHA, on the facts of this case, had a continuing duty to engage in the interactive process to find an effective and reasonable accommodation *after* the first attempt failed, the Ninth Circuit has both aligned itself with the other Circuits which have addressed this issue and has issued a ruling which is consistent with the letter and spirit of the ADA. *See Ralph v. Lucent Technologies*, 135 F.3d 166, 172 (1st Cir. 1998)

("The duty to provide reasonable accommodation is a continuing one . . . not exhausted by one effort"); *Bultmeyer v. Fort Wayne Community School*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784 (6th Cir. 1998); EEOC: Guidance on Reasonable Accommodation Under the ADA, Pet., App. E at 63a-64a ("If a reasonable accommodation turns out to be ineffective . . . the employer must consider . . . an alternative reasonable accommodation"). The Ninth Circuit decision breaks no new legal ground nor raises any important question of federal law that needs to be addressed by this Supreme Court. The Ninth Circuit decision is a *fact-bound* case which simply applied existing principles of ADA jurisprudence to the circumstances that enveloped MHA and Humphrey during the Summer and Fall of 1995. Because the case below *is* fact-intensive and MHA's Statement Of The Case omits important facts upon which the Ninth Circuit relied, Humphrey offers the following supplement to MHA's factual background.

FACTUAL BACKGROUND

There are two critical events which are not accurately depicted in MHA's petition: (1) the June 7, 1995 meeting between Humphrey and MHA and (2) the September 21, 1995 e-mail from MHA to Humphrey which rejected Humphrey's request for a work-at-home accommodation.

The first critical event occurred when Humphrey and MHA's ADA coordinator (Pierson) met on June 7, 1995 to discuss Dr. Jacisin's letter and the issue of reasonable accommodation for Humphrey's disability. Contrary to the characterization in MHA's petition, the record below does *not* establish that MHA offered Humphrey a leave of absence

and she rejected it. As the Ninth Circuit noted in its opinion, "what happened at this meeting is disputed". *Humphrey*, Pet., App. A at 4a. What the record below does indicate is that MHA contends that there was a clear offer and firm rejection of a leave of absence. Humphrey, on the other hand, contends that there was never an offer and rejection; but, rather, an open-ended discussion, the thrust of which was that she wanted to continue to work if at all possible. Accordingly, the June 7 discussion focused on accommodations that might accomplish that goal.

The second critical point occurred at the end of September, 1995, when Humphrey, upset about her continuing attendance problems, sent an e-mail message to MHA's ADA coordinator (Pierson) asking for a new accommodation because the flexible start-time was not working. Pierson responded by e-mail on September 21, 1995. She denied Humphrey's request for a work-at-home position and failed to suggest any alternative accommodation or any further discussions:

> It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME ARRANGEMENT FOR TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your

> productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work.

Pierson never attempted any further contact with Humphrey. Humphrey was fired approximately two and one-half weeks later.

As is shown below, these facts demonstrate that the Ninth Circuit decision is not about either: (1) the failure of an employer to offer an accommodation already offered and rejected (MHA's first question presented) or (2) a request for an indefinite leave of absence (MHA's second question presented). Rather, the Ninth Circuit decision revolves around the breakdown of the ADA-mandated interactive process.

REASONS FOR DENYING THE WRIT

I. MHA's First Question Mischaracterizes The Holding Of The Ninth Circuit

In a nutshell, MHA's argument in favor of granting the writ is as follows: First, MHA characterizes the Ninth Circuit opinion as holding that an employee, who finally and categorically rejects a reasonable accommodation, can later assert that the employer violated the ADA by failing to offer her that same accommodation. MHA then crafts its first question presented based on this characterization. *See* Pet. at 2. Finally, MHA attempts to create a conflict between the "purported" Ninth Circuit holding and decisions of other Circuits. *See Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996) and *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212 (8th Cir. 1999).

The logic of MHA's petition is fatally flawed because the premise of its argument is simply wrong. The Ninth Circuit did not issue the broad, per se rule embodied in MHA's first question. In fact, the Ninth Circuit decision did not involve a resolution of the dispute between Humphrey and MHA as to whether there was ever an offer and rejection of a leave of absence at the June 7 meeting. *See Humphrey*, Pet., App. A at 4a. The heart of the Ninth Circuit decision involved the breakdown of the ADA-mandated interactive process and the assignment of responsibility therefor. *See Humphrey*, Pet., App. A at 18a-22a: "BREAKDOWN OF THE INTERACTIVE PROCESS".

The facts in this case demonstrate that there was an initial interactive meeting between MHA and Humphrey on June 7 which produced a reasonable accommodation (flexible start-time). The accommodation was implemented, but failed. MHA knew that the accommodation was failing and, furthermore, Humphrey notified MHA of its failure and requested another accommodation (work-at-home) on September 18. MHA summarily denied her request on September 21 and never again engaged her in the interactive process before terminating her employment several weeks later. These facts are the essential ingredients of the Ninth Circuit's decision. *See Humphrey*, Pet., App. A at 20a-21a:

> By the time of her annual performance review in September, it was abundantly clear to MHA that the flexible start time accommodation was not succeeding; Humphrey had accumulated six unreported absences in each of the months of August and September, and her evaluation stated that her attendance record was "unacceptable". At this point, MHA had a duty to explore further

arrangements to reasonably accommodate Humphrey's disability.

Humphrey also realized that the accommodation was not working, and requested a work at home position. When it received that request, MHA could have either granted it or initiated discussions with Humphrey regarding other alternatives. Instead, MHA denied her request without suggesting any alternative solutions, or exploring with her the possibility of other accommodations. Rather than fulfill its obligation to engage in a cooperative dialogue with Humphrey, *Pierson's e-mail suggested that the matter was closed*: "During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect".[2] We held in ***Barnett*** that an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives. See ***Barnett***, 228 F.3d at 1116-17. Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was

2. The Ninth Circuit's conclusion is by no means extraordinary. *See Bultmeyer v. Fort Wayne Community*, 100 F.3d at 1285: "Bultmeyer may have thought it was futile to ask [for an accommodation], after [the employer] told him that he would not receive any more special treatment".

> aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process (emphasis added).

None of the factual or legal issues discussed in the above-quoted portion of the Ninth Circuit decision raise any matters that are novel or out-of-step with the ADA jurisprudence of this Court or other Circuit Courts. Furthermore, the passage above clearly demonstrates that the Ninth Circuit did not announce the broad, per se rule contained in MHA's first question. The Ninth Circuit held that, *under the facts of this case*, one attempt at an accommodation, which proved ineffective, did not insulate MHA from its duties to engage in the interactive process and, hence, from liability under the ADA.[3]

The concept that the ADA, under certain factual circumstances, may require a continuing duty on the part of the employer, as well as the employee, to engage in the interactive process in an effort to find a reasonable and effective accommodation is widely accepted throughout

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3. MHA attempts to paint the Ninth Circuit decision as leading to "employer liability in ways that Congress could never have intended . . . [because] the employer can never be sure that it has done all it can to accommodate a worker before terminating her employment". *See* Pet. at 19. The Ninth Circuit decision does not foreshadow such a result. The Ninth Circuit decision is not about a third, fourth, fifth, etc. opportunity to implement a reasonable accommodation. The Ninth Circuit decision, based on the facts, holds that *one* attempt at an accommodation, which proves ineffective, does not, ipso facto, satisfy the requirements of the ADA. MHA's "parade of horribles" argument demonstrates the dangers that occur when broad generalizations are made about a case without reference to the factual background contained therein.

the other Circuits and comports with the letter and spirit of the ADA. *See Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171 (1st Cir. 1998). ("The duty to provide reasonable accommodation is a continuing one . . . not exhausted by one effort"); *Bultmeyer v. Fort Wayne Community School*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784 (6th Cir. 1998); EEOC: Guidance On Reasonable Accommodation Under The ADA, Pet., App. E at 63a-64a ("If a reasonable accommodation turns out to be ineffective . . . the employer must consider . . . an alternative reasonable accommodation"); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 n.12 (1st Cir. 2000).

In addition, the Ninth Circuit proposition that an employer who does not adequately *respond* to a request for an accommodation may act in bad faith is not novel. *See Bultmeyer*, 100 F.3d at 1285 ("A party that fails to communicate, by way of . . . response, may also be acting in bad faith"); *Taylor v. Phoenixville School District*, 184 F.3d 296, 317 (3d Cir. 1999) ("Employers can show their good faith [by] . . . offer[ing] and discuss[ing] available alternatives when the request is too burdensome"); *Garcia*, 212 F.3d at 648 n.12 ("Here, [the employer] failed to engage in the informal, interactive process. It simply rejected the request for accommodation without further discussion . . .").

Lastly, the rule that the ADA interactive process is mandatory and that liability may arise from the failure to engage in that process is similarly well-accepted. Almost all the Circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process. *See Barnett v. U.S. Air, Inc.*, 228 F.3d

1105, 1114-16 (9th Cir. 2000), *certiorari granted on other grounds*[4], and the cases cited therein.

Given that MHA has mischaracterized the Ninth Circuit decision below, it is clear that there is no purported conflict between this case and the cases cited by MHA (*see Hankins v. The Gap, Inc.* and *Mole v. Buckhorn Rubber Products, Inc.*). Neither *Hankins* nor *Mole* dealt with the issue addressed in this case — namely, the breakdown of the interactive process and assignment of responsibility therefor.

The Petition should be denied for another reason: the first question presented by Petition is based on a factual dispute (*i.e.*, did Humphrey categorically and finally reject MHA's explicit offer of a leave of absence at the June 7 meeting) that was never resolved and, therefore, was not germane to the Ninth Circuit's decision. *See Humphrey*, Pet., App. at 4a: "As it turns out, this factual dispute is not material to our ruling on appeal". It is true that the Ninth Circuit stated that its ruling would not change even if it assumed that Humphrey initially "turned down the leave of absence in June in favor of a flexible start time arrangement". However, that statement is dicta. This Court should not attempt to review a legal issue for which the factual predicate is unresolved in and immaterial to the decision below.

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4. The Petition For Writ Of Certiorari in *Barnett* raised two questions, one dealing with the interaction between the ADA and an employer seniority policy and the other dealing with the requirements of the interactive process under the ADA. This Supreme Court denied the Petition as to the second question. Certainly, the facts and holding of the Ninth Circuit decision herein present no more compelling reason for review by this Court than did the similar issue in *Barnett*. *See U.S. Airways v. Barnett*, Docket No. 00-1250.

In conclusion, the Ninth Circuit decision rests on its unique facts and does not establish any wide-ranging, general rule which justifies review by this Court. The Ninth Circuit decision is consistent with and reflective of the case-by-case approach which underscores ADA jurisprudence. *See Garcia-Ayala*, 212 F.3d at 650 ("[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes"); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (individualized attention is "essential" to resolution of disability claims); *Cehrs*, 155 F.3d at 782. Accordingly, review of this fact intensive Ninth Circuit decision by this Supreme Court would not serve to resolve any important questions of federal law.

II. The Ninth Circuit Did Not Hold That Humphrey Was Entitled To An Indefinite Leave Of Absence As MHA's Second Question Claims

The second question presented by MHA suffers from the same malady as its first question: It is purely hypothetical because it does not arise from the facts or the holding of the Ninth Circuit decision. The Ninth Circuit's decision is not about Humphrey's *request* for an indefinite leave of absence. The Ninth Circuit held that, under the facts of this case, a leave of absence was a reasonable accommodation that should have been, at a minimum, *offered* to Humphrey before she was terminated by MHA. *See Humphrey*, Pet., App. A at 22a ("... MHA was under a continuing duty to offer a reasonable accommodation"). Given that the offer was never extended to, let alone discussed with Humphrey after MHA knew that the first accommodation (flexible start time) was failing, the issue of the *length* of the leave of absence never arose in this case.

The issue of the duration of the leave of absence never arose for several other reasons as well. First, MHA conceded that granting a leave of absence would not have imposed an undue hardship. Second, MHA had a policy and practice of granting leaves of absence ranging from six months to two years. Lastly, MHA admitted that it would have given Humphrey a leave of absence had she asked for one at any time before her termination. *See Humphrey*, Pet., App. A at 8a, 22a and District Court Order, App. B at 29a.

If MHA had fulfilled its continuing duty to engage in the interactive process and had offered Humphrey a leave of absence between Humphrey's September 18 request for the work-at-home accommodation and her October 10 termination, the issue of the length of the leave of absence would have been considered. MHA could have determined the length in several ways. It could have asked Humphrey for her opinion as to the required length, it could have consulted with the psychiatrist, Dr. Jacisin, who had alerted MHA to the fact that Humphrey might require a leave of absence[5] or it could have simply selected a time period that it believed was reasonable.[6] In any event, once the length of

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5. Dr. Jacisin's initial letter did not specify the exact length of the leave of absence. However, this did not relieve MHA of its responsibilities to make further inquires of Dr. Jacisin if it felt the need to do so. *See Bultmeyer*, 100 F.3d at 1285 ("If the note was too ambiguous and [the employer] did not know what [the employee] wanted, [the employer] easily could have called [the psychiatrist] for a clarification").

6. Even the District Court Judge recognized that MHA cannot rely on an argument that Humphrey was requesting an indefinite leave of absence. *See* District Court Order, Pet., App. B at 34a ("Defendant cannot prevail on this issue by casting it in absolute terms. Nothing prevented defendant from granting plaintiff a leave of absence with a *specific time period*").

the leave of absence was selected, Humphrey would then have been in a position to either accept or reject MHA's offer. Once the above process occurred and the results were known, *i.e.*, Humphrey rejected the offer because it was too short or accepted the offer but was unable to return to work after the specified leave of absence expired,[7] then this case might have been ripe for a determination by the Ninth Circuit on the issue as to the appropriate length of the leave of absence. However, none of the above occurred and, therefore, the Ninth Circuit never reached the issue concerning the length of the leave of absence.[8]

Given that the Ninth Circuit did not hold nor even suggest that an indefinite leave of absence is a reasonable accommodation, *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995) and the other cases cited by MHA are irrelevant and, hence, establish no "conflict among the Circuits".

In conclusion, the factual and legal posture of this case make unworkable MHA's suggestion that this case is the

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7. Presumably, Humphrey would never have rejected a leave of absence because it was "too long" nor would there by any litigation in this case had MHA given Humphrey a leave of absence and she had been able to successfully return to work, either before or at the time of the expiration of the leave.

8. In other words, MHA should not be allowed to profit from its own wrongdoing. The product of MHA's failure to engage in the interactive process in the Fall of 1995 was that the issue of the length of the leave of absence never arose at that time. MHA cannot now seek to take advantage of its own misconduct by arguing that neither Humphrey nor Dr. Jacisin precisely defined the limits of the leave of absence. As noted above, if the interactive process had gone forward, the issues as to the length of the leave of absence would have been resolved at that time.

proper vehicle "to clarify if and when a leave of absence is a reasonable accommodation under the ADA" (*See* Pet. at 26). First, as to the factual issues, MHA conceded that a leave of absence would not have been an undue hardship, that it had a policy of granting leaves of absence and, that if Humphrey had requested one, MHA would have granted the request. These factual concessions by MHA do not create a record appropriate for the wide-ranging review sought by MHA.

Second, as to the legal issues, MHA's suggestions that the Ninth Circuit's decision: (1) is an "approval of indefinite leave" and (2) endorses the proposition that an employer "must allow an employee an indefinite leave of absence" are unsupportable. The Ninth Circuit never addressed these issues because of the factual posture of the case. Therefore, this Court should not grant review of hypothetical questions, unconnected to the record and decision below.

1. As a sub-question of the second question presented, MHA asks this Court to review the Ninth Circuit statement that, under the facts of this case, a leave of absence is a reasonable accommodation if it could "plausibly" have been successful. Once again, MHA attempts to turn a case-specific holding into a per se rule in an attempt to create a "split among the Circuits".

MHA argues that there is a split in the Circuits, *i.e.*, between the Ninth Circuit decision on the one hand and the Eleventh Circuit on the other hand, because the Ninth Circuit used the term "plausibly" and the Eleventh Circuit used the term "likely" when evaluating the reasonability of a leave of absence as an accommodation. However, a close analysis of the factual circumstances of the cases reveal no inconsistency: MHA's Eleventh Circuit case involves a request for an indefinite leave of absence — *Humphrey* does not.

MHA relies chiefly on *Duckett v. Dunlop Tire Co.*, 120 F.3d 1222 (11th Cir. 1997). However, *Duckett* did not involve a detailed analysis of the standard of proof required in evaluating a leave of absence request. Rather, *Duckett* involved an employee's *request* for an indefinite leave of absence. *Id.* at 1226. Relying on *Myers*, another case involving a request for an indefinite leave of absence, *Duckett* held that such a request was unreasonable. *Id.* at 1226. It seems clear, therefore, that *Duckett's* use of the term "likely" is directly related to its evaluation of a request for an indefinite leave of absence and is not an attempt to craft a per se standard of proof for all cases.

Further proof that *Duckett* is consistent with *Humphrey* is that fact that Phillis A. Kravitch, Senior Judge, joined in the decisions in both cases. It is unlikely that she would have done so if they are legally inconsistent with one another, as claimed by MHA.[9]

As noted above, *Humphrey* is *not* about a request for an indefinite leave of absence[10], but about the breakdown of

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9. MHA's reliance on *Hudson v. MCI Telecommunications, Corp.*, 87 F.3d 1167 (10th Cir. 1996) is unavailing for two reasons. First, *Hudson* never used the term "likely" and, second, it also involved a *request* for an indefinite leave: "Because the accommodation plaintiff urges, unpaid leave of indefinite duration, does not constitute a 'reasonable accommodation' under the ADA, we affirm." *Id.* at 1168.

10. In reality, this sub-question is nothing more than a reformulation of the second question's main premise that the Ninth Circuit announced a per se rule approving indefinite leaves of absence. As shown above, that premise had no foundation in the record or decision of the Ninth Circuit. Therefore, there is no basis to grant review of the second question in any incarnation put forth by MHA.

the interactive process, which forestalled any discussion between MHA and Humphrey about the length of the leave of absence that MHA should have offered to Humphrey before firing her. Under these unique facts, the Ninth Circuit's use of the "plausible" standard has no more far-ranging significance than other "terms of art" or standards used by other courts in applying a case-by-case resolution of ADA disability claims. *See Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998) (a leave of absence "might" return employee to her job); *Bultmeyer*, 100 F.3d at 1285 (employee "may have been able" to perform job with reasonable accommodation); *Garcia-Ayala*, 212 F.3d at 648:

> Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

Accordingly, the petition's second question, like its first, is not deserving of review by this Court.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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